SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-016061 04/14/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

PHOENIX K K 2 L L C

DAVID W DOW

v.

PHOENIX CITY, et al.

JAMES H HAYS

COURT ADMIN-CIVIL-CCC
DOCKET-CIVIL-CCC

MINUTE ENTRY

IT IS ORDERED directing the Civil Docket Clerk to amend the caption to show Respondents/Real Parties in Interest as "**v. CITY OF PHOENIX, et al.**", rather than Phoenix City, et al.

This Court has jurisdiction of this Special Action pursuant to the Arizona Constitution Article VI, Section 18, and Rules 1, 3, and 4, Rules of Procedure for Special Actions. Additionally, the City of Phoenix has enacted an ordinance that specifically provides a remedy by way of Petition for Special Action to bring issues relating to Phoenix' Sexually Oriented Business Ordinances before the Superior Court on an expedited basis.[1] Due to the nature of Petitioner's First Amendment Claim regarding the constitutionality of the city's ordinance establishing regulations for sexually oriented businesses ("SOB"), an appeal is not an adequate remedy for Petitioner. This Court will, therefore, accept Special Action jurisdiction in this case.

[1] City of Phoenix Ordinance Section 10-140(b).

Issue Presented

The only issue presented in this case is the constitutionality of Phoenix City Code Sections 10-148(A)(1) and Section 10-138. Petitioner argues that these ordinances violate the First and Fourteenth Amendment of the United States Constitution and Article II, Sections 4 and 6 of the Arizona Constitution, and has requested that the ordinances be invalidated as unconstitutional restrictions upon Petitioner's rights of free speech and expressive conduct. This Court determines that the Phoenix City Code Sections regulating and prohibiting sexual physical contact between nude dancers and patrons is not expressive conduct protected by the First and Fourteenth Amendment to the United States Constitution, or Sections 4 and 6 of Article II of the Arizona Constitution. This Court, therefore, determines that the Phoenix City Ordinances at issue are appropriate and constitutional regulations of sexually oriented businesses.

Standard of Review

The issues raised by Petitioner are matters of constitutional dimension and statutory construction. In matters of statutory construction, the standard of review is *de novo*.[2] Additionally, appellate courts must review the constitutionality of a statute or ordinance *de novo*.[3]

The Ordinances

The City of Phoenix enacted Phoenix City Code Section 10-148 which established regulations that relate to SOBs featuring nudity or live performances. The provisions challenged by the Petitioner are subsection(A)(1). Those sections provide:

> A. A sexually oriented business that features live persons who appear in a state of nudity or live performances that are characterized by the exposure of specified anatomical areas or by specified sexual activity shall be operated in accordance with the following regulations. It is unlawful for a licensee or employee to knowingly fail to insure compliance with the following:
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> 1. No employee, using their hands or any other part of their body may knowingly make contact with the female breasts of any person, or the anus or genitals of any other person while either person is

[2] In re: Kyle M., 200 Ariz. 447, 27 P.3d 804 (App. 2001).
[3] State v. McMahon, 201 Ariz. 548, 38 P.3d 1213 (App.2002); McGovern v. McGovern, 201 Ariz. 172, 33 P.3d 506 (App. 2001); Ramirez v. Health Partners of Southern Arizona, 193 Ariz. 325, 972 P.2d 658 (App. 1998).

> located in the clearly designated area in which patrons may be present or upon a stage. No patron, using their hands or any other part of their body while on the licensed premises, may knowingly make contact with the breasts of any female employee, or the anus or genitals of any employee. For purposes of this subsection, (contact) shall include contact that occurs through clothing or by means of any other object.

Section 10-138 authorizes the Licensed Appeal Board of the City of Phoenix to suspend an SOB license upon a violation of Section 10-148.

Facts and Procedural History

Petitioner, KK2, operates an establishment within the City of Phoenix called Kitty's Klub, a SOB. On April 12, 2002, a letter was delivered to Kitty's Klub entitled "Notice of Intent to Suspend". This letter signed by the Phoenix City Clerk informed Kitty's Klub of the intent of the city to suspend its SOB license for several violations of Phoenix City Code Section 10-148. The Notice of Intent to Suspend SOB License alleged the following violations:

> On February 8, 2002, the City of Phoenix Police Department Vice Enforcement Unit conducted an investigation of your business. The following violations of the city's SOB ordinance were observed at that time:
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> 1. An adult cabaret performer, Evette Crystal Lewis, aka "Diamond" during a one-on-one performance for a patron repeatedly ground her nude genital area into the clothed genital area of the patron, rubbed her nude breasts against the patron's face, ground her knees into the clothed genital area of the patron, and bumped her nude genitals against the patron's noise, all in violation of City Code Section 10-148(A)(1).
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> 2. An adult cabaret performer, Rocio C. Alfaro, aka "Violet" during a one-on-one performance for a patron, repeatedly ground her nude genital area into the clothed genital area of the patron, in violation of City Code Section 10-148(A)(1).
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> 3. Failure to maintain a signed statement in the hard copy files for Evette Crystal Lewis and Alicia Mavis Soto, as required by paragraph (B)(9) of Code Section

10-148, and to make those files available for police department inspection as required by subsection (B) of that section.[4]

On August 6, 2002, the License Appeal Board of the City of Phoenix issued an order suspending Petitioner's SOB license for a period of seven (7) consecutive days, commencing on August 20, 2002. The parties have agreed that this order shall be suspended and stayed pending disposition of this Special Action proceeding.

The instant Petition for Special Action was filed by Petitioner in this court on August 19, 2002. The parties stipulated to an extended briefing schedule to include appropriate supplementation to this court's record. This Court heard oral argument on February 19, 2003, and this case has been under advisement since that date.

Discussion

Petitioner argues that the suspension of their SOB license for an alleged violation of City Code Section 10-148(A)(1), and its suspension clause of Section 10-138, are in violation of the First and Fourteenth Amendment of the Constitution of the United States,[5] and Article II, Sections 4 and 6 of the Arizona Constitution in the following respect: there is no adverse, substantial secondary effects by the conduct allegedly prohibited by such sections as required by the United States and Arizona Constitutions. Petitioner requests that the ordinances be "invalidated." The City argues that the ordinances are constitutional.

Petitioner heavily relies on City of Los Angeles v. Alameda Books[6] for its constitutional argument, arguing that this decision adds two additional criteria to the "time, place and manner" analysis established by Renton v. Playtime Theatres, Inc..[7] Petitioner argues that "Justice Kennedy now requires" that: 1) a determination that the effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech; and 2) A provision singling out SOB's for special restrictions must be likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech. This Court rejects those contentions as not supported by a careful reading of Justice Kennedy's opinion, but more importantly, this Court concludes that Alameda Books has no application to this case, despite the excellent discussion and analysis

[4] Notice of Intent to Suspend Letter, dated April 12, 2002 at pages 1-2, also included as exhibit A to the Petition for Special Action.

[5] In re Louise C., 197 Ariz. 84, 86, 3 P.3d 1004, 1006, 307 Ariz. Adv. Rep. 11 (App. 1999)(the right to free speech is protected by the First and Fourteenth Amendments to the United States Constitution).

[6] 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002).

[7] 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986)(To pass constitutional muster, an ordinance must further a "substantial government interest," be "narrowly-tailored," and leave open "ample alternative avenues of communication." Here, a zoning ordinance primarily aimed at adult motion picture establishments was treated as a content-neutral "time, place and manner" regulation).

of that case by both counsel. In Alameda Books, the United States Supreme Court addressed the constitutionality of the City of Los Angeles zoning ordinance that had the potential to eliminate and prohibit adult video arcades and adult book stores in extensive areas within the city. In contrast, the City of Phoenix ordinances involve a regulatory licensing ordinance that regulates the conduct of dancers and patrons in SOBs.

The United States Supreme Court has explained that a "state of nudity" is not an inherently expressive condition.[8] Nude dancing may qualify as expressive conduct, but "we think that it falls only within the outer ambit of the First Amendment's protection (citation omitted)."[9] Requiring dancers to wear G-strings and pasties does not dispossess the dance performance of the message it conveys, but makes the message slightly less graphic.[10] Any effects on the overall expression and the performer's First Amendment rights are *de minimus*.[11]

Interestingly, Petitioner claims that the ordinance is in violation of the First and Fourteenth Amendment to the United States Constitution and Article II, Section 4 and 6 of the Arizona Constitution, yet Petitioner's memorandum never discusses these sections. This case does not implicate the First Amendment to the U.S. Constitution. Respondents appropriately argue that the city ordinance: 1) does not require the dancers to wear a minimum costume; 2) does not prevent them from simulating sexual acts; 3) does not deny them their procedural rights under *Freedman v. Maryland*[12]**;** and 4) it does not prevent them from performing due to a conviction for a non-sexual offense. The ordinance purely prevents one from engaging in sexual conduct with another person on the premises of an adult cabaret.

Sexual contact or conduct with another person on the premises of an SOB is not the type of conduct protected by the First Amendment. In a strikingly similar case, the Fifth Circuit United States Court of Appeals upheld Arlington, Texas' city ordinance containing a "no touch" provision that prohibited touching between nude cabaret performers and customers within the adult cabarets.[13] The Ninth Circuit Court of Appeals noted:

> Hang On argues that the "no touch" provision is unconstitutionally overbroad in violation of the First Amendment. Barnes v. Glen Theatres Inc. (citation omitted), held that nude dancing itself "is expressive conduct within the outer perimeters of the First Amendment." It does not inevitably follow, however, that touching between a nude performer and a customer is protected expression.

[8] City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000).
[9] Id., 529 U.S. at 289, 120 S.Ct. at 1391; Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991).
[10] Id.
[11] Id.
[12] 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).
[13] Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1253 (5th Cir. 1995).

> We recognize that the theatre of expressive dancing may be limited only by the art and creativity of the performers. "It is possible to find some kernel of expression in almost every activity a person undertakes…but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." City of Dallas v. Stanglin, 490 U.S. 19, 25, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989). This said, intentional contact between a nude dancer and a bar patron is conduct beyond the expressive scope of the dancing itself. The conduct at that point has overwhelmed any expressive strains it may contain. That the physical contact occurs while in the course of protected activity does not bring it within the scope of the First Amendment.…
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> Similarly, patrons have no First Amendment right to touch nude dancers (citation omitted).[14]

In an unusual case, also before the Fifth Circuit United States Court of Appeals, that court upheld Dallas, Texas' city ordinance prohibiting dancer-patron contact within adult cabarets.[15] In that case, Baby Dolls Topless Salons offered evidence at the U.S. District Court level concerning the "expressive nature of touch" in the course of a nude or erotic dance. And, Baby Dolls also offered the testimony of a cultural anthropologist that "innocuous touch between a dancer and patron communicates a distinct message, including 'the man is king for the moment', as it were."[16] The Fifth Circuit rejected such evidence finding it irrelevant, and citing Hang On Inc. v. City of Arlington, concluded that intentional contact between a dancer and patron has overwhelmed any expressive strains it may contain.[17]

The First Amendment does not bar enforcement of regulations directed at unlawful conduct that manifests no element of protected expression.[18] Further, the Petitioner must show that the regulation involves "constitutionally protected conduct," in order to implicate the First Amendment.[19] The party "desiring to engage in assertedly expressive conduct" has the burden to prove that that "the First Amendment even applies."[20] Petitioner failed to discuss both the First and Fourteenth Amendment. Given the case law and reasoning previously discussed, this Court concludes that the First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, and Sections 4 and 6 of Article II of the Arizona

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[14] Id., 65 F.3d at 1253.
[15] Baby Dolls Topless Salons, Inc. v. City of Dallas, Texas, 295 F.3d 471 (5th Circuit 2002).
[16] Id., at 484.
[17] Id.
[18] City of Colorado Springs v. 2354 Inc., 896 P.2d 272, 292 (Colo. 1995).
[19] IDK v. Clark County, 836 F.2d 1185, 1196 (9th Cir. 1988).
[20] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065, n. 5, 82 L.Ed.2d 221 (1984).

Constitution do not protect physical sexual contact between a nude dancer and a patron of a SOB. [21]

Conclusion

This Court concludes that Phoenix City Code Sections 10-148(A)(1) and 10-138 are constitutional as permissible regulations of conduct within SOBs. The sexual conduct, and the suspension of a business license of a business which allows the conduct to occur, do not involve conduct protected by the First Amendment to the United States Constitution or any provision of the Arizona Constitution. Sexual contact between a nude dancer and an SOB patron is clearly conduct beyond the expressive scope of the dancing itself and that physical contact is not protected by the United States or Arizona Constitutions.

IT IS THEREFORE ORDERED denying any and all relief requested by the Petitioner in the Petition for Special Action filed in this case.

IT IS FURTHER ORDERED that the seven-day suspension of Petitioner's SOB license imposed by the City of Phoenix License Appeal Board be sustained.

IT IS FINALLY ORDERED that counsel for the Respondent shall lodge an order consistent with the minute entry with this court no later than May 20, 2003.

[21] Arizona Law also prohibits sexual contact in the following circumstances: without the consent of the person being touched (A.R.S. Section 13-1404); with a minor (A.R.S. Section 13-1405); when a third person is present and a Defendant is reckless about whether the sexual contact would offend or alarm the other person (A.R.S. Section 13-1403); and by a Corrections employee or a person in custody (A.R.S. Section 13-1419).